

FEDERAL CIRCUIT COURT OF AUSTRALIA

Hwang v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCCA 3549

File number(s): BRG 210 of 2020

Judgment of: **JUDGE VASTA**

Date of judgment: 13 November 2020

Catchwords: **MIGRATION** – review of administrative appeals decision
– whether decision affected by jurisdictional error –
jurisdictional error not established – application dismissed

Legislation: *Migration Act 1958* (Cth)
Migration Regulations 1994 (Cth), reg 1.15A(3)

Number of paragraphs: 17

Date of last submission/s: 13 November 2020

Date of hearing: 13 November 2020

Place: Brisbane

Counsel for the Applicant: Mr Alksov

Solicitor for the First
Respondent: Ms Topham

ORDERS

BRG 210 of 2020

BETWEEN: YEONHWA HWANG
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE VASTA

DATE OF ORDER: 13 NOVEMBER 2020

THE COURT ORDERS:

- A. That a writ of certiorari issue directed to the Second Respondent quashing its decision dated 9 March 2020.
- B. That the First Respondent pay the Applicant's costs, fixed in the sum of \$7,467.00.
- C. That a writ of Mandamus issue directed to the Second Respondent requiring it to determine the Applicant's application dated 7 December 2017 according to law.
- D. IT IS NOTED:**
 - A. That the Court has determined that the decision of the Delegate dated 9 March 2020 is affected by jurisdictional error, in that the Delegate failed to properly consider s.5F(2) of the *Migration Act 1958* (Cth) and s.1.15A(3)(d)(iv) of the *Migration Regulations 1994*.
 - B. That the Court will not provide a written version of the reasons for judgment delivered today, unless an appeal has been lodged or the Court has received a request in writing from either party seeking that written reasons be produced.

REASONS FOR JUDGMENT

(Ex tempore)

JUDGE VASTA

- 1 On 9 March 2020, the Administrative Appeals Tribunal (“the AAT/the Tribunal”) affirmed a decision not to grant the Applicant, Yeonhwa Hwang, a partner visa. On 3 April 2020, Ms Hwang, the Applicant, asked this Court to review that decision.
- 2 The background of the matter is that the Applicant was born in South Korea in 1991. She came to Australia on a working holiday visa, which ceased on 1 August 2013. The sponsor was also born in South Korea in 1991 and is the same age as the Applicant. He had arrived in Australia in 2010 on an electronic travel authority and was granted an employer nomination visa on 10 January 2011 as a dependant family member. He obtained Australian citizenship by grant on 19 November 2015.
- 3 The parties met on an internet networking site in October 2012 and they married on 29 July 2013. The Applicant applied for a visa on 30 July 2013, the very next day, on the basis of the relationship. She was granted a subclass 820 visa on 19 August 2013.
- 4 The delegate eventually declined to issue the permanent partner visa because it had not been established, to the satisfaction of the delegate that the Applicant was in a genuine and continuing relationship with the sponsor. The Applicant took this decision to the Tribunal.
- 5 The Tribunal looked at all aspects of the relationship in a very thorough manner except for one aspect about which I will soon detail. The Tribunal looked at the Applicant’s movement records showing that she had spent extensive periods outside of Australia following the grant of the subclass 820 visa.
- 6 The records show that she spent about six months outside of Australia between 28 November 2013 to 5 May 2014, about a week outside of Australia in January 2015, about four weeks outside of Australia in January 2016, about nine months outside of Australia in July 2016 to March 2017 and then another nine months from March 2017 to December 2017. Realistically, from January 2016 to December 2017, the Applicant was only in Australia for a period that would amount to about seven months.

- 7 The sponsor himself had departed Australia on 12 occasions between November 2013 and December 2019. It would seem that there was only one occasion that he was with the Applicant. The sponsor spoke of times where he was living in Melbourne with his sister and the Applicant was in Korea, running a café.
- 8 The Tribunal put all of those matters to the Applicant because one might look at those records on their face and such records would be confirmatory of the fact that this was not a genuine spousal relationship. The Tribunal then went through all of the criteria that they had to look at pursuant to the legislation. There are some 15 subcategories contained in four categories.
- 9 The Tribunal looked at the financial aspects of the relationship, which really showed that the parties were, in effect, not pooling their resources; they were not doing anything that would show that their finances were being put together for common goals.
- 10 The Tribunal looked at the nature of the household and looked at what time the Applicant and sponsor were actually living together in the same premises and noted that the living arrangements of the parties were more akin to young people in a long-term boyfriend/girlfriend relationship or possibly two young people in a friendship of convenience for the purpose of a migration outcome.
- 11 The Tribunal looked at the social aspects of the relationship and accepted that the parties were recognised as being in a boyfriend/girlfriend relationship and had participated in social activities on this basis. They represented as engaged to be married on their Facebook – or certainly the sponsor did on his Facebook status - and some of the family members and friends supported the visa application, but the Tribunal was not satisfied that the parties had represented themselves as being married to each other. The Tribunal was not satisfied that they have been recognised and related to as a married couple by their friends and family.
- 12 The Tribunal went into the nature of the commitment to each other given that they have spent significant periods alone; where the sponsor had gone to Melbourne, he said, because of a unique study opportunity but then did not study, and the Applicant going back to Korea for a unique business opportunity, which objectively speaking, was no business opportunity at all.
- 13 The parties spoke of each other being free spirits; that they would go off and do their own things and that neither of them wanted to be a burden on the other.
- 14 The Tribunal ended up saying this at paragraph 53:

The tribunal accepts that the parties are long-term friends, that they have been in a boyfriend/girlfriend relationship and they have friends in common and that they have travelled together. The tribunal accepts that they have provided each other with companionship and emotional support. The tribunal accepts that they have publicly presented themselves as engaged. The tribunal considers, however, that the parties might have used Australia's marriage and migration laws in order to pursue a migration outcome. The tribunal acknowledges that the motivation to obtain a visa does not preclude the possibility of parties being in a genuine spousal relationship. The tribunal in this case, having considered the evidence and circumstances of the parties, is not convinced they are in a genuine spousal relationship. The tribunal is not satisfied that the parties have lived together in a spousal relationship in over six years of claimed marriage and is not satisfied that they see the relationship as long-term. (My underlining inserted upon revision of the Reasons)

For the above reasons, the tribunal does not find the parties have a mutual commitment to a shared life to the exclusion of others, does not find that they are in a genuine and continuing relationship and does not find that they live together or not separately in part on a permanent basis.

- 15 Given those findings, it was not surprising that the Tribunal affirmed the decision.
- 16 The grounds of this application are quite succinct. They are that the Tribunal acted irrationally in finding that the Applicant and her husband do not see the relationship as a long-term one and thereby failed to consider reg 1.15A(3)(d)(iv) of the *Migration Regulations 1994* (Cth).
- 17 To start with, one needs to look at the Regulations. As previously mentioned, there are 15 subcategories that the Tribunal must engage with whether directly or inferentially. As I had indicated during the recitation of the Tribunal's reasoning, the Tribunal had looked at the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other.
- 18 That last category is important in this case. The nature of the persons' commitment to each other includes:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one. (My underlining inserted upon revision of the Reasons)

- 19 It is trite to say that the relationship, that the Regulations are wanting the decision-maker to examine, is the relationship which the Tribunal actually finds exists. The Tribunal has found

that this relationship was a boyfriend/girlfriend-type relationship of convenience where they did get some emotional support and companionship from each other, but was, as they found, more akin to friends who are committed to having a relationship that would hopefully result in a positive migration outcome.

20 It is after the Tribunal made that ultimate finding that the Tribunal said in paragraph 53, almost in an afterthought, that the Tribunal was not satisfied that the Applicant and sponsor see the relationship as a long term one.

21 The basis for that finding on a reading of paragraph 53 seems to be based upon the Tribunal already having come to the conclusion that this was not a genuine spousal relationship. Because of this fact, the Tribunal has then found that the parties do not see this as a long term relationship because it is not a genuine spousal relationship.

22 It seems to me then that the Tribunal has, unfortunately, put the cart before the horse in that they have found already that the Applicant and the sponsor are not in a genuine spousal relationship therefore they cannot see the relationship as a long term one.

23 The relationship, such as it is, was not examined at all by the Tribunal as to whether it was a long term one. The relationship of convenience that was found by the Tribunal to exist had actually been going on for some six years. There was no finding as to whether that convenience was going to keep going on or would cease once a successful migration outcome had been achieved.

24 In this way, that aspect of examining whether the persons see the relationship as a long term one was not actually conducted by the Tribunal before it came to the conclusion that there was not a genuine spousal relationship. This, I accept, is an extremely technical argument but it is one where, ultimately, the Applicant is correct. The law prescribes that, in assessing whether there is a genuine spousal relationship, the Tribunal needs to ask itself the question posed by all 15 subcategories in reg 1.15A(3).

25 In this case, the Tribunal has clearly, either directly or by proper inference, asked itself the questions posed by 14 of those aspects but it did not do so in the 15th one; that is, whether the persons see the relationship as a long term one. It would seem to me that the last clause of the last sentence of paragraph 53 was almost an afterthought by the Tribunal so that they could say that they had considered all 15 matters.

- 26 In many respects, if the Tribunal had not stated that last clause, it may well have been inferred that they had looked at that matter; but by inserting that clause, in the manner in which they have, it illustrates that regard has not been had to this aspect.
- 27 This is, as I say, a technical requirement but unless this Court can be confident that all 15 aspects of reg 1.15A(3) have been considered by the Tribunal, the Court cannot be satisfied that the Tribunal has undertaken the task it was given to do.
- 28 Just as there are many matters that come before the Court where the Court has quite a deal of sympathy for an Applicant and yet must find that there has not been any jurisdictional error, there are the cases where the opposite is true. This is one such case.
- 29 I find that there is a jurisdictional error. I find that the Tribunal has failed to consider reg 1.15A(3)(d)(iv) which amounts to the jurisdictional error. I will therefore issue the writs.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Vasta.

Dated: 4 February 2021